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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

15.65 ACRES OF LAND IN THE COUNTY OF MARIN, STATE OF CALIFORNIA; MARIN RIDGELAND COMPANY, a joint venture comprised of O.D.C. OF CALIFORNIA, INC., a corporation; and J. H. SCHEUER, a.k.a. JAMES H. SCHEUER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON J. GOLDSTEIN
RALPH GOLUB
M. REED HUNTER
COUNSEL OF RECORD
JOHN J. DACEY
GOLDSTEIN, BARCELOUX & GOLDSTEIN
650 California Street
San Francisco, CA 94108
Telephone: (415) 433-3000

JESS S. JACKSON
Professional Corporation
650 California Street,
San Francisco, CA 94108
Telephone: (415) 433-3000
Attorneys for Petitioner Marin Ridgeland Company

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6300

QUESTIONS PRESENTED

1. Is a trial court empowered to pass upon the question of the necessity of acquiring particular property for a governmental project in the face of a congressional determination that such acquisition is necessary?

2. May the owner of a tract of land, partially taken by the federal government, claim severance damages for substantial impairment of the remainder of his tract resulting from the contemporaneous partial taking of his property and the acquisition of contiguous properties, as part of a single integrated project, where the impact upon the remainder from the partial taking and from the acquisition properties is inseparable?

3. Is the tripartite test of indispensability, substantiality and inseparability established by the Court of Appeals for the Ninth Circuit in the opinion below:

(a) repugnant to the Fifth Amendment to the Constitution of the United States,

(b) inconsistent with the controlling law established by Congress and this Court,

(c) devoid of ascertainable standards, or

(d) unsound and unworkable?

4. Should the widely criticized opinion of this Court in *Campbell v. United States,* 266 U.S. 368 (1924), be reconsidered?

LIST OF PARTIES

In addition to petitioner and the United States, the following were parties in the proceedings below:

Housing Authority of the County of Marin; Redevelopment Agency of the County of Marin; County of Marin; and Unknown Owners.

None participated actively at trial.

TABLE OF CONTENTS

	Page
Questions presented	i
List of Parties	i
Opinions below	1
Statement of jurisdiction	1
Constitutional provisions and statutes involved	5
Statement of the case	5
Reasons why writ should be granted	9
I	
The functions of Congress, court and jury in eminent domain actions are firmly established by legislation and precedent of this court	9
A. All factual and legal issues save the amount of just compensation are for the condemning agency or judge	9
B. Of three issues identified by Ninth Circuit, "Indispensability" and "Substantiality" are for legislative resolution and "Inseparability" is for judicial resolution	11
1. Indispensability and Substantiality once established by Congress are not for judicial review	11
2. Inseparability is a question for the court	12
V	
Severance damages were clearly proven. The challenged instruction was either fully in accord with controlling law or, if erroneous, contained only harmless error	12
A. General severance instruction proper	12
B. Ample proof of indispensability, substantiality and inseparability in record	14
C. A valuation instruction going to highest and best use	15

TABLE OF CONTENTS

Page

D. If erroneous, the challenged instruction was harmless surplusage 17

1. The test of harmless error 17

2. Had only subject property been taken, damage to remainder from loss of access would have been identical 17

3. Instruction as given more stringent than necessary 17

E. Appropriate proof made at trial 18

VI

Campbell v. United States: a need for reexamination 18

A. The general standard 18

B. The particular problem 18

C. Campbell 19

D. Campbell rarely applied, widely criticized 20

E. Pope & Talbot and comparable cases 21

F. Proof at Trial 23

G. Campbell holding leads to injustice and invites abuse 24

Conclusion 25

TABLE OF AUTHORITIES CITED

Cases

Page

Andrews v. Cox, 129 Conn. 475, 29 A.2d 587 (1942) 21, 22
Armstrong v. United States, 364 U.S. 40 (1960) 18
Berman v. Parker, 348 U.S. 26 (1954) 11, 14
Blesch v. Chicago & Northwestern Railway Co., 43 Wis. 183 (1977) 20
Campbell v. United States, 266 U.S. 368 (1924) ....i, 3, 4, 11, 18, 20, 21, 22, 23, 24
City of Crookston v. Erickson, 244 Min. 321, 69 N.W.2d 909 (1955) 21
C.K. & N. Ry. Co. v. Van Cleave, 52 Kan. 665, 33 P. 472 (1893) 20
Haggard v. Independent School District, 113 Iowa 486, 85 N.W. 777 (1901) 20, 21
Newman v. Brengle, 250 F.2d 660 (7th Cir., 1958) 7
Olson v. United States, 292 U.S. 246 (1934) 16
State v. Board of Education of City of Elizabeth, 116 N.J. Super 305, 282 A.2d 71 (1971) 21
Union Electric Light & Power Co. v. Snyder Estate Co., 65 F.2d 297 (8th cir. 1933) 24
United States v. Fuller, 409 U.S. 488 (1973) 18
United States v. Grizzard, 219 U.S. 180 (1911) 24
United States v. Mischke, 285 F.2d 628 (8th Cir. 1961) 11
United States v. Pope & Talbot, Inc., 293 F.2d 822 (9th Cir. 1961) 3, 12, 14, 15, 21, 22, 23
United States v. Reynolds, 397 U.S. 14 (1970) 4, 9, 12, 14
United States v. Welch, 217 U.S. 838 (1910) 24
U.S. v. 320 Acres, 605 F.2d 817 16
United States v. 100.0 Acres, 468 F.2d 1261 (9th Cir. 1972) 15
United States v. 105.40 Acres, 471 F.2d 207 (7th Cir. 1972) 10
United States v. 156.81 Acres of Land, Etc., 671 F.2d 336 (9th Cir. 1982) 7, 8
United States v. 174.12 Acres of Land, 671 F.2d 313 (9th Cir. 1982) 15

Table of Authorities Cited

Cases

	Page
United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979)	10
United States v. 403.14 Acres of Land, Etc., 553 F.2d 565 (8th Cir. 1977)	19
U.S. v. 416.81 Acres of Land, 514 F.2d 627 (7th Cir. 1975)	11
United States v. 442.94 Acres, 264 F.Supp. 506, 507 (S.D. Iowa 1967)	11
United States v. 478.34 Acres of Land, Tract No. 400, 578 F.2d 156 (6th Cir. 1978)	10
U.S. v. Miller, 317 U.S. 369 (1943)	16, 18, 19
West Virginia Pulp & Paper Co. v. United States, 200 F.2d 100 (4th Cir. 1952)	23

Constitution

United States Constitution, Fifth Amendment	1, 5

Rules

Federal Rules of Civil Procedure, Rule 17A(h)	9, 12
Supreme Court Rule, Rule 17.1(c)	4

Statutes

16 U.S.C.:	
Section 460bb	5, 11
Section 460*l*-4	5, 11
28 U.S.C. Section 1254(1)	1
40 U.S.C. Section 257	5, 11

Other Authorities

Orgel, Valuation under Eminent Domain (2d Ed. 1953) § 56, p. 263	21
4A Nichols, Law of Eminent Domain, § 1421[1], n. 8.1 (3d Ed. 1980)	21

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VS.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Marin Ridgeland Company, a joint venture comprised of O.D.C. of California, Inc., a corporation and James S. Scheuer (herein "the landowners")[1] respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Nature of Opinion or Order	Date of Issuance (and Date of Entry Where Different)	Where Reproduced in Appendices
District Court Judgment	August 15, 1980 (entered December 5, 1980)	Appendix A (pp. A-1 through A-9)
District Court Order Denying Interest	December 5, 1980	Appendix B (pp. A-10 through A-11)
Opinion of the Ninth Circuit	May 25, 1982	Appendix C (pp. A-12 through A-23)
Order of the Ninth Circuit	September 10, 1982	Appendix D (p. A-24)
Amended Opinion of the Ninth Circuit	September 10, 1982	Appendix E (pp. A-25 through A-35) Published at 689 F.2d 1329

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

The issues here presented involve construction of the just compensation clause of the Fifth Amendment to the

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[1]In the interim, since the District Court rendered its initial judgment, there has been a change in ownership of that part of the property which is the subject matter of this action remaining in private hands. Pursuant to the terms of conveyance and judgment below, this is not of legal significance in terms of either the Ninth Circuit proceedings or this petition.

Constitution of the United States. These issues are both substantive and procedural.

Petitioner owned approximately 164 acres of ridgetop land in affluent Marin County, California. 15.65 acres of that larger parcel was acquired by the United States for park and recreation purposes, along with contiguous lands. The basic issues raised in this petition center around the landowners' entitlement to severance damages for a taking attributable to destruction of access to their remaining 149 acres.

At marked variance with the precedent of this Court, the Federal Rules of Civil Procedure, and logic, the Ninth Circuit held that such severance damages were only recoverable if it could be demonstrated that each element of a three-part test was met: (1) that the land taken was "indispensable" to the integrated project; (2) that the part taken was a "substantial" part of the project; and (3) that damages to the remainder attributable to acquisition of the part taken were "inseparable" from those attributable to the acquisition of adjoining parcels.

In so doing, the Ninth Circuit:

(1) redefined the respective roles of Congress, court and jury in a condemnation action in a fashion at odds with holdings of this court;[2]

(2) misinterpreted its own precedent in point; and

(3) created a murky and erroneous precedent that will be most difficult to interpret and implement in subsequent trials, including the retrial of this case.

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[2]In its initial, and now superseded, opinion, the Ninth Circuit held that the several elements of the tripartite test were to be determined by the *jury*. The error of this ruling was pointed out in petitions for rehearing by *both* the landowners and the United States. Opinion modifications in the direction requested followed, but these were insufficient to effect the necessary cure. In fact, in some particulars the modified opinion is *more* confusing than the original.

Of the several flaws which taint this opinion perhaps the most striking is its total incongruity with the existing law of necessity. Heretofore, by statute and by rule of this Court, a decision of the legislative body of an acquiring agency that a particular parcel is necessary to a project has been conclusive. If this opinion is not struck down, courts will be invited to second-guess Congress and acquiring agencies, making independent judgments on questions of project location, project scope and even whether a particular project should proceed or be scuttled.

The ruling on substantiality elevates descriptive language in a prior case to a universal prospective requirement.

The consideration of separability is comparably flawed. This is a nonissue; in case of an integrated project (as here) damages are inseparable by definition.

Not only will substitution of this tripartite test for prior practice complicate and extend future trials, it presents a potential for anomalous results, frequent reversals on appeal, and striking injustice.

Much of the difficulty in the Ninth Circuit opinion is traceable to its wrestling with a much earlier decision of this court, *Campbell v. United States*, 266 U.S. 368 (1924). *Campbell* has consistently caused confusion and injustice when extended beyond its markedly unique facts, as here. It has been widely criticized by other courts, and by virtually all commentators who have attempted to analyze the opinion in a broader context. There may be justification for a continued viability of the role of *Campbell* as an explicit exception to an implied general rule, which general rule this Court has not had the opportunity to fully articulate. Some state and lower federal courts have articulated the general rule of compensability. The leading circuit court case in point is *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961), the precedent referred to in subparagraph (2) on page 2 above.

In the 59 years since *Campbell*, this Court has substantially restructured the underlying policy and philosophical basis of just compensation law, emphasizing fairness and equity. Even limited to its own facts, *Campbell* is dissonant to both the letter and spirit of the more recent holdings of this Court. It is ripe for re-examination.

Petitioner respectfully urges that the granting of this petition is appropriate and desirable pursuant to Supreme Court Rule 17.1(c) in that:

(a) it presents important questions of federal law as to (i) allocation of authority of condemning agency and trial court, and in particular as to the right of the court to substantially intrude into government policy decisions, and (ii) computation of severance damages in cases where part of a landowner's property is taken in connection with an integrated project involving several acquisitions, that this Court should settle; and

(b) the decision below is in conflict with applicable decisions of this Court, notably *Berman v. Parker*, 348 U.S. 26 (1954). In spite of its purported reliance thereon, the opinion also appears to be in clear conflict with *United States v. Reynolds*, 397 U.S. 14 (1970).

The decision is also repugnant to federal statute.

Further, the Court's opinion has created specific injustice. The landowners clearly proved that they suffered severance damages in at least the amount awarded, and that the damages occurring from the partial take and from the acquisition of contiguous properties were inseparable. Both trial and appellate courts recognized the landowners' right to seek and obtain such damages, and a retrial will be a costly and time-consuming redundancy.

The original deadline for the submission of this petition was December 9, 1982. Following timely application, that deadline was extended to February 7, 1983, by an Order dated December 9, 1982, signed by the Honorable Justice William H. Rehnquist.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

The following statutes, set forth verbatim in the Appendix, are also involved: 16 U.S.C. § 460bb; 16 U.S.C. § 460*l*-4; 40 U.S.C. § 257.

STATEMENT OF THE CASE

To ensure the retention in their natural state of some of the most scenic upland properties in the West San Francisco Bay Area, the United States in the early 1970's provided funding for acquisition of such properties under the aegis, and within the boundaries, of the Golden Gate National Recreation Area. Included in this project was a substantial part of Wolf Back Ridge, a spiny and spectacular hilltop area which sits atop the urban corridor in southeast Marin County, offering striking views in all directions.

The government filed, in due course and pursuant to its power of eminent domain and the authorities identified in the last preceding section, actions in eminent domain to acquire:

(1) 15.65 acres out of a larger parcel of 164.03 owned by petitioner; and

(2) Substantial properties contiguous to petitioner's parcel on Wolf Back Ridge referred to in the record as the "Glass Property" and the "Fitzsimmons Property" because of their dominant ownership.[3]

[3]Each of these three actions eventually culminated in an eminent domain trial. Both the Fitzsimmons and Glass properties were acquired in their entirety. R.T. 418.

The three properties are utilized, and were intended to be utilized, for an integrated unitary open space use. Appendix "A" to the Court of Appeal opinion reproduced from a chart included in petitioner's brief, illustrates the relationship of the properties to each other and surrounding landmarks.

The acres taken from petitioner were, topographically, among the choicest and most level of the property. The remainder contains some very steep property. The loss of the prime level top acreage greatly enhances the difficulty of developing the remainder. R.T. 419-422, 464-465, 556.

Trial commenced July 28, 1980. Petitioner urged, and the court ruled, that in determining the amount of severance damages[4] due to the owners pursuant to the just compensation mandate, the jury could consider the integrated Wolf Back Ridge acquisition (i.e., the acquisition of the Glass and Fitzsimmons properties as well as the subject property), since the damages resulting from these various acquisitions could not be rationally separated. R.T. 1267. The court also permitted evidence of the fact that, as a direct and inevitable consequence of the G.G.N.R.A. acquisition, there was a reasonable probability that local officials would rezone the property into a more restrictive classification.

Petitioner demonstrated to the satisfaction of court and jury by abundant evidence (typically uncontradicted) a

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[4] he landowners are aware that some federal courts disfavor the term "severance damage", preferring reference to the "before" (pre-acquisition) and "after" (post-acquisition) values of the aggregate parcel. The landowners are further aware that there is an ongoing debate as to the propriety of the term. In this case, use of the before-after test or a direct severance damage award at trial would have brought (as is typical) the same result, and the difference is semantic only. The term "severance damage" was used as a convenient shorthand at trial and during appeal, appears in the opinion, and will be used in this petition.

severe deprivation of access to the remainder because of the aggregate acquisition,[5] and such reasonable probability of rezoning. It was further shown that development plans for the property, consistent with the controlling zoning, were well into the formative stages prior to the government's announcement of its intent to take, and would have come into fruition but for the intrusion of the governmental acquisition activities. R.T. 147-149, 151-153.

The jury awarded $438,200.00 for the fee taking, and $623,196.00 for severance damages. The government appealed from the severance damage award.[6]

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[5]This impairment of access consisted of the destruction of the separate southern access routes: the first route went through the take, the Glass and the Fitzsimmons properties, a fraction of a mile to the main arterial (U.S. Highway 101); the second went through the take down to the flatlands below, and was suitable for alternative ingress to the remainder. The sole remaining access is from Donahue Street-Alta Avenue to the north, which now will form a cul-de-sac at intersection of the remainder and the take. This access reduction adversely affected both conventional traffic flow and the availability of emergency services. R.T. 451-453, 480. See map included as Appendix A, Ninth Circuit Opinion. Appendices p. A-35.

It is significant that had the United States acquired only petitioners' 15.65 acres, and had the Glass and Fitzsimmons properties either been developed or remained idle, *exactly the same damage due to impairment of access would have resulted.*

[6]A cross-appeal was taken by the landowners from the decision of the trial court denying interest on the judgment. The court of appeal reversed the trial court on this question, and held that the landowners were entitled to interest at a fair market rate from March 5, 1979, the date of valuation, until the judgment is satisfied.

The Ninth Circuit had similarly ruled (that time by 2 to 1) in *United States v. 156.81 Acres of Land, Etc.*, 671 F.2d 336 (9th Cir. 1982), which involved the Fitzsimmons property. Certiorari on the interest question was sought in the Fitzsimmons case. Under date of December 13, 1982 this Court declined to grant that petition, and left the interest award undisturbed. For reasons made clear in

Under date of May 25, 1982, the Court of Appeal issued its opinion reversing the trial court's award of severance damages, and remanded the issue to the trial court. It stated, in effect, that petitioner could demonstrate both impairment of access and reasonable probability of project-induced adverse rezoning, but pursuant to different instruction,[7] with the jury to determine indispensability, substantiality and inseverability.

Both the landowners and the United States promptly petitioned for rehearing. Predictably, many of the bases of attack in the two petitions varied, but *both were in full accord that that part of the opinion requiring the jury to make determinations previously made by the acquiring authority and the court was impractical, illogical and inconsistent with precedent and near uniform practice throughout the United States.*

Apparently surprised by this unexpected adversarial concurrence, the Ninth Circuit did modify its opinion, but only cosmetically where radical surgery was required.

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the record and advocacy documents filed below, it is respectfully urged that the facts in this case are stronger than *United States v. 156.81 Acres of Land* in support of the interest award.

The landowners seek no review of this portion of the Ninth Circuit opinion.

[7]The Court specifically attacked this instructional language:

> "If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder."

This instruction is considered in *Reasons Why Writ Should Be Granted*, Point IV, *infra*.

REASONS WHY WRIT SHOULD BE GRANTED

I

THE FUNCTIONS OF CONGRESS, COURT AND JURY IN EMINENT DOMAIN ACTIONS ARE FIRMLY ESTABLISHED BY LEGISLATION AND PRECEDENT OF THIS COURT

A. All Factual and Legal Issues Save the Amount of Just Compensation Are for the Condemning Agency or Judge

Rule 71A (h) of the Federal Rules of Civil Procedure, which controls procedure in federal condemnation trials states that a party may request a jury trial on the issue of just compensation, but that "[t]rial of all issues shall otherwise be by the court."

In *United States v. Reynolds*, 397 U.S. 14 (1970), this honorable Court held that this "[r]ule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial," requiring "him to decide 'all issues' other than the precise issue of the amount of compensation to be awarded," and that the jury "is to be confined" to "a single narrow but important function," the determination of the amount of the award, "within ground rules established by the trial judge", 397 U.S. at 20.

The Court applied this general rule in *United States v. Reynolds* to hold that the judge should determine whether property condemned was within the original scope of the federal project so that its value would not include enhancement attributable to the project. 397 U.S. at 20-21. This preliminary issue was one of fact and is analogous to a preliminary issue determined by the District Court in this action; i.e., whether damages to the remainder of the property owners' land caused by the taking itself were separable from damages attributable to the taking of the lands of others.

In another factually analogous situation the Seventh Circuit in *United States v. 105.40 Acres*, 471 F.2d 207 (7th Cir. 1972) held that the trial judge and not the jury should determine the factual question of whether parcels condemned were an integral part of a larger parcel owned by the defendant or were functionally separate parcels.[8] Once threshold issues such as those in the present case are determined by the judge, it is the jury's function to determine whether factors preliminarily decided by the judge as "reasonably probable" have any actual effect as in raising or lowering the amount of just compensation to be paid. Cf. *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979);[9] *United States v. 478.34 Acres of Land, Tract No. 400*, 578 F.2d 156 (6th Cir. 1978).

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[8]From the opinion:

> "The judge should then instruct the jury on the issue of just compensation, consistent with his preliminary factual determination. If the judge decides that the two parcels were an integral part of the entire 1939 acres, then he should instruct the jury to award 'just compensation' in accordance with the law as stated in Part I of this opinion; if the judge decides that the two parcels were functionally separate units from the main tract, then he should instruct the jury consistently with that finding." 471 F.2d at 212.

[9]In footnote 127 of *U.S. v. 320.0 Acres*, the court explained how the court, and not the jury, is to determine whether the jury may consider a particular theory or element of damages:

> "[T]he judge determines whether an arguable *element* (or source) of value is a legally cognizable element of value for which compensation may be awarded, ... the trier of fact decides whether it is *in fact* an element of fair market value and, if so, just how much *value* it in fact represents." 605 F.2d at 818; emphasis in original.

B. Of Three Issues Identified by Ninth Circuit, "Indispensability" and "Substantiality" Are for Legislative Resolution and "Inseparability" Is for Judicial Resolution

1. Indispensability and Substantiality Once Established by Congress Are Not for Judicial Review

Indispensability, as used in the Ninth Circuit opinion, appears synonymous with necessity.[10] It is firmly established, by statute and decisional law of this court, that the necessity of acquiring a parcel of land for a project is in the sole discretion of the appropriate legislative authority.

This is true by general and specific statute. See 16 U.S.C. §§ 460bb and 460*l*-4, and particularly 40 U.S.C. § 257 (all reproduced in Appendix G).

Similarly, the amount of the land to be taken is also a question for the legislative branch.

This Court has repeatedly held that "[t]he amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan" rests in the discretion of the legislative branch", and is not a matter for judicial review. *Berman v. Parker*, 348 U.S. 26, 35-36 (1954).

So strong is this power that "[o]nly in cases of egregious bad faith will the right to condemn be denied. . . ." *U.S. v. 416.81 Acres of Land*, 514 F.2d 627, 632 (7th Cir. 1975). See also *United States v. Mischke*, 285 F.2d 628 (8th Cir. 1961); *United States v. 442.94 Acres*, 264 F.Supp. 506, 507 (S.D. Iowa 1967).

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[10]The original of the phrase is clear: it is from the sentence in *Campbell* (265 U.S. at 371) in which this Court noted that "[t]he land taken from the plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the United States." This language was quoted and expanded in *Pope & Talbot*.

2. Inseparability Is a Question for the Court

Inseparability, as a preliminary question of fact, is, under Rule 71A(h) and *United States v. Reynolds*, for the judge to determine. Once the trial judge determines that damages to the remainder, attributable to the taking of adjoining property are inseparable from those attributable to the take, he or she instructs the jury that they may consider both elements of damage in determining their award. Should the judge determine the damages are separable, he or she instructs the jury that they may consider those damages to the remainder resulting from the take.

As will herein be demonstrated, this procedure was properly implemented below.

V

SEVERANCE DAMAGES WERE CLEARLY PROVEN

THE CHALLENGED INSTRUCTION WAS EITHER FULLY IN ACCORD WITH CONTROLLING LAW OR, IF ERRONEOUS, CONTAINED ONLY HARMLESS ERROR

A. General Severance Instruction Proper

Even assuming that the Ninth Circuit test expresses the law, the judgment should have been affirmed. As previously discussed (Argument Point I, *supra*), two of the three elements in the Ninth Circuit test ("indispensability" and "necessity") were resolved by Congress. Third element, "inseparability", was to be considered by the Court before instructing the jury. This requirement was fully met at the trial of this action.

The applicability of the *Pope & Talbot* rule was briefed and argued to the trial judge. Memorandum of Law filed August 12, 1980; R.T. 479-481, 558-559, 1240-1241.[11] The

[11]Mr. Goldstein: As the first matter for the record, your Honor had requested us to provide you with some written and oral materials concerning the issue of severance damage in the case where it is affected and impacted by activities of the government on ad-

judge, after hearing all the evidence, properly determined that the loss of the southern access was a "legally cognizable" element of damage. It gave a general and appropriate severance damage instruction to the jury and further instructed that the jury could consider the loss of the southern access as severance damages only if it found that the availability of such access to the property before the take was reasonably probable.[12] Under the rule of

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jacent properties acquired as a part of the project, contiguous to the part taken, and an extension area.

The Court: That's right.

Mr. Goldstein: We have filed a memorandum of law re: Impact of Project and Project-Related Acquisitions To Damage Remainder.

As a practical matter, the court and counsel have had a discussion presentation in chambers on the subject matter. And we simply at this time, without extending it, wish to indicate on the record that it has been considered, that it has been briefed . . .

The Court: I am allowing the instruction that if the jury believes there is a reasonable possibility that had the project not been there, and the Fitzsimmons and Glass Property developed, and that there was reasonable possibility in the jury's mind that it would have developed the access which you claim, then they may consider that as severance.

. . . .

(R.T. 1240-1241)

[12]The instruction in its entirety provides:

"If you find that by taking the land for the uses and purposes for which it has been condemned by the government, damage will result to the larger tract or parcel of which the portion is condemned is a part, then you will consider the dimensions and location of the tract or parcel condemned, the purpose for which it is to be used, the manner in which the improvement is to be constructed, the effect, if any, that its natural configuration, the situation, condition or shape in which it will be placed, the improvements thereon, and the uses to which it is best adapted, for the purpose of determining the market value of the property taken and for the purpose of determining the market value of the portion of the larger tract not taken, to ascertain the damages, if any, to the part not taken.

United States v. Reynolds, supra, Berman v. Parker, supra and *United States v. Pope and Talbot* that instruction was fully sufficient.

B. Ample Proof of Indispensability, Substantiality and Inseparability in Record

The trial court's determination that the *Pope & Talbot* criteria had been proven is fully supported in the record.

The Congressional Act which approved the taking of Wolfback Ridge (Glass, Fitzsimmons, and Marin Ridgeland) lands, admitted into evidence as Exhibit 15 (R.T. 66), acknowledges that the taking of the Wolfback Ridge area was to "preserve the scenic quality" and viewshed of those properties and others designated for scenic protection, presumably Oakwood Valley. (R.T. 263, 699, 707.) R.T. 263, 510, 515-516, 543, 582, 699, 707. Development of the narrow, lengthy Marin Ridgeland strip of land that

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You are instructed that no consideration shall be given to nor allowance of just compensation made for any elements of value depending upon events or circumstances or combination of occurrences, which, while within the realm of possibility, have not been shown by a preponderance of the evidence by the landowners to be reasonably probable in the reasonably near future after the date of valuation.

For example, the property owners assert the value of the remainder has been diminished by the taking of the Glass and Fitzsimmons properties by virtue of their belief that had such properties developed without intervention of the project, a southerly access to the subject property over the Glass and Fitzsimmons properties would have been available.

If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder." (R.T. 1266-1267.)

was taken would have destroyed this entire viewshed. Thus the taking of the Marin Ridgeland strip was indispensible to the project, and was substantial.

The unified project acquisition cut off the remainder's southern access, rendering that property substantially less capable of development and proportionately less valuable.

C. A Valuation Instruction Going to Highest and Best Use

The portion of the instruction to which objection has been taken, designated by the Ninth Circuit as the "operative portion" of the severance damage instruction (Amended Opinion, f.n.3), is in fact part of a valuation (before-and-after) instruction. It is not, nor was intended to be, an expression of the *Pope & Talbot* rule. The necessary threshhold determination having been made by the court, the jury was instructed to determine whether, absent the project, there was a reasonable probability that the southern access, which was at the time of trial a dirt road going across the taken property, would have been developed and available across the Glass and Fitzsimmons properties[13] and that should the jury so find, it could then consider loss of that access in determining the market value of the remainder.[14] This is consistent with decisions of this Honorable Court.

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[13]This instruction, as to the reasonable probability that access would have been available across neighboring lands is analogous to the instruction approved by the Ninth Circuit in *United States v. 100.0 Acres*, 468 F.2d 1261 (9th Cir. 1972), wherein the district court instructed the jury that it could consider whether there was a "reasonable probability that adjoining state-owned tidelands would have been available in connection with the development of the subject property". 468 F.2d at 1267-1268.

[14]It is noteworthy that the portion of the instruction dealing with reasonable probabilities was specifically upheld by the Ninth Circuit in *United States v. 174.12 Acres of Land*, 671 F.2d 313 (9th Cir. 1982).

As part of the jury's province in determining damages, it is required to ascertain the fair market value of the property, i.e., what a reasonable willing buyer would pay a willing seller. *U.S. v. Miller*, 317 U.S. 369 (1943). In *Olson v. United States*, 292 U.S. 246, 255-257 (1934) the Supreme Court held that such a buyer would consider:

> " . . . "all elements of value that inhere in the property . . . upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. Elements affecting value that depend upon events or combinations of occurrences which . . . are not fairly shown to be reasonably probable should be excluded from consideration." 292 U.SC. at 255-257.

It is hornbook eminent domain law that testimony going to the reasonable probability of value-impacting events is admissible to be weighed as part of the jury's task of determining compensation.

> "[O]nce the landowner has produced credible evidence that a potential use is reasonably practicable and reasonably probable within the near future, it is for the jury (or commission) to decide whether the property's suitability for this use enhances its market value, and, if so, by how much." *U.S. v. 320 Acres, supra*, 605 F.2d at 817. See also *United States v. 100.0 Acres, supra.*

Here, the reasonable probability of development of the property with a southern access route obviously impacted highest and best use, and thus value and was properly considered by the jury in its valuation process.

D. If Erroneous, the Challenged Instruction was Harmless Surplusage

1. The Test of Harmless Error

If damages would have been identical had a proper instruction been given in place of an erroneous one, error is harmless. *Newman v. Brengle*, 250 F.2d 660, 662 (7th Cir., 1958).

2. Had Only Subject Property Been Taken, Damage to Remainder from Loss of Access Would Have Been Identical

As noted above, it is indisputable that had *only* the 15.65 acres been taken, and the Glass and Fitzsimmons parcels remained in their former ownerships, southern access would have been fully and permanently destroyed just as it was by the integrated acquisition. An instruction to the jury to access damages for loss of access resulting *solely* from the taking would have led to an incidental result.

3. Instruction as Given More Stringent than Necessary

This instruction was actually more onerous to the landowners than it needed to be. Here, the district court advised the jury that it could *only* consider loss of the existing road access if there was a reasonable probability that but for the project it would have been available to the landowners. In fact, the road was clearly so available and had been for years.

Assuming, *arguendo*, that there was error in giving the instruction, it was mere surplusage[18] and harmless error, and in view of its comparative narrowness more beneficial to the government than to the landowners.

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[18]The other valuation instructions given were largely form instructions, the legal sufficiency of which has long been established.

E. Appropriate Proof Made at Trial

The Ninth Circuit held that the landowners could prove damages resulting from loss of access. At trial, they proved such damages.

The Ninth Circuit further held that the landowner could prove damages from governmental activities which created a reasonable probability of a restrictive rezoning. At trial, they proved such damages.

A second trial would be unnecessary, an imprudent use of time for all parties and an imposition upon the court.

VI

CAMPBELL v. UNITED STATES: A NEED FOR REEXAMINATION

A. The General Standard

The philosophical premise of the constitutional protection embodied in the just compensation clause of the Fifth Amendment is basic fairness. Its *raison d'etre* is to protect citizens from government action which would have the effect of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

It requires, as set forth in its definitive expression, that a condemnee must be returned to "as good a position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller,* 317 U.S. 369, 373 (1943). The protection afforded by the just compensation clause "derives as much content from the basic equitable principles of fairness [citation omitted] as it does from technical concepts of property law." *United States v. Fuller,* 409 U.S. 488, 490 (1973).

B. The Particular Problem

In cases where only part of a larger parcel is acquired, this standard can only be implemented if the property

owner is compensated for impairment of the property remaining in his ownership as well as the actual acquisition. The standard for determining such severance damages is broad and flexible:

> "If only a portion of a single tract is taken, the owner's compensation for that taking includes *any element of value* arising out of the relation of the part taken to the entire tract." *United States v. Miller, supra,* 317 U.S. at 376.

This principle, in the context of the fair market value test by which damages are determined, requires that any element of value which would influence a willing seller and a willing buyer in negotiating for a sale of the remainder be considered in determining compensation. *United States v. 403.14 Acres of Land, Etc.,* 553 F.2d 565, 567, n. 2 (8th Cir. 1977).

The severance damage computation is complicated where, as here, the partial take is only one of several contiguous parcels acquired for a substantial public project. If, for example, a parcel has a value of $1,000,000 *before* such an acquisition, and the remainder of that parcel a value of $500,000 *after* such acquisition, how do you determine which part of that loss is attributable to the particular take, and which part is attributable to the adjacent acquisitions? As a practical matter, of course, you cannot. The only manner in which the landowner can be placed in as good a position pecuniarily as before is to receive fair compensation for the *entire* diminution. And this is the solution favored by commentators and by most courts who have analyzed the problem. See below.

C. Campbell

Apparently by chance, this problem reached this honorable Court not in its typical posture where damages resulting from the partial take and the taking adjacent

cannot be separately measured, but in a decidedly idiosyncratic and atypical factual context.

In *Campbell* part of the condemnee's property and various properties owned by other landowners were acquired for expansion of a nitrate plant. The property of the condemnee, however, was never used for the nitrate plant. The lower court was able to separately assess, *and did separately assess,* severance damages to the landowner's remaining parcel caused by the taking itself and damages caused by the acquisition and use of adjoining lands. The condemnee apparently acquiesced in the separate assessment of damages. This Court held that under these circumstances, the damage attributable to acquisition of adjoining lands was not compensable. In doing so, it distinguished three state court cases, *Blesch v. Chicago & Northwestern Railway Co.*, 43 Wis. 183 (1977); *C.K. & N. Ry. Co. v. Van Cleave*, 52 Kan. 665, 33 P. 472 (1893); *Haggard v. Independent School District*, 113 Iowa 486, 85 N.W. 777 (1901), which awarded severance damages for the uses made of property acquired from others as follows:

> "In each of these cases, it was impossible separately to ascertain the damages caused to the remainder of the owner's tract by the taking and proposed use of a part of it. In this case, such damages were separately found and plaintiff does not complain in respect of the amount of that element." 266 U.S. at 372.

D. Campbell Rarely Applied, Widely Criticized

For a 60-year-old United States Supreme Court opinion, *Campbell* has served as *stare decisis* in remarkably few cases. The reasons for this are readily apparent. The situation it addressed, where the aggregated damages can be rationally severed, is extremely rare. The rule it espoused has been characterized as "too difficult of application to be of any practical value" (*Haggard v. Independent School*

District, 113 Iowa 486, 85 N.W. 777 (1901),[16] and as advocating an "apportionment that can seldom be realistically made." *City of Crookston v. Erickson*, 244 Min. 321, 69 N.W.2d 909, 913 (1955). See also *State v. Board of Education of City of Elizabeth*, 116 N.J. Super 305, 282 A.2d 71, 77 (1971).

The holding is also in disrepute with commentators. The author of the standard eminent domain valuation text has described the rule as "an attempt to separate the inseparables." Orgel, *Valuation under Eminent Domain* (2d Ed. 1953) § 56, p. 263.

The author of another leading commentary has correctly noted:

> "This rule has been criticized on the ground that it is difficult, if not impossible, to separate one element from the other, and that under the circumstances the owner of the remainder area is entitled to all damage caused by the use of the entire project. A railroad for instance is an entire thing. It is impossible for any human intelligence to separate the loss of injury which its operation causes, allocating so much to one portion and so much to another." 4A Nichols, *Law of Eminent Domain*, § 1421[1], n. 8.1 (3d Ed. 1980).

E. Pope & Talbot and Comparable Cases

Both before and after *Campbell*, courts have awarded compensation for damages to property caused by the taking of adjacent property where the part taken and the adjacent property have unified use. See, for example, the three cases distinguished in *Campbell; Andrews v. Cox*, 129 Conn. 475, 29 A.2d 587 (1942); and *State v. Board of Education of City of Elizabeth, supra.* From *Andrews v. Cox, supra:*

> "Where the use of the land taken constitutes an integral and inseparable part of a single use to which

[16] *Haggard* was decided before *Campbell* but it discussed and rejected the identical rule of law.

> the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land." 29 A.2d at 590.

These cases are not in direct conflict with *Campbell*; indeed, under *Campbell's* own analysis their result is logical. Again, it is noted emphatically that it is clear from *Campbell's* express language that the damages there were separable and, indeed, *were separately assessed by the lower court,* and that such separability was a *sine qua non* of that decision.

The leading Federal case in this line is *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961). There, the court examined the issue of whether a condemnee, in a partial take situation, was entitled to compensation for loss in market value of the remainder due to a project including the land taken and adjacent land. The salient facts of *Pope & Talbot* are virtually indistinguishable from those of the present case.[17] The court held:

> "With reference to circumstances regarded as significant in *Campbell,* we note that here the land taken was indispensable to the dam project; that *damages resulting to the remainder from the use of land taken are inseparable from damages resulting to the remainder from the use of government land.*"
>
> . . .
>
> "[T]he loss in market value of the remainder (due to the fact that the lake created a condition reducing the accessibility of those lands) *was rationally attributable to the use to which the taken lands were put;* that

[17] In *Pope & Talbot,* the United States condemned fifteen different tracts of land, including the condemnee's, for a dam. The lake behind the dam flooded part of the remainder and other properties including a portion of the main roadway through the condemnee's property.

appellee was entitled to compensation for such damage; that neither the receiving of evidence nor the instructions to the jury upon this point constituted error." 293 F.2d at 825-826; emphasis added.

In *Pope & Talbot*, the Ninth Circuit analyzed *Campbell* and *West Virginia Pulp & Paper Co. v. United States*, 200 F.2d 100 (4th Cir. 1952), in which damages were allowed, and reached the conclusion on the basis of "[t]he reasoning of the court in *Campbell*" that *"West Virginia Pulp and Paper Company* should control". 293 F.2d at 825.

The problem lies in the fact that *Campbell* which states the exception, is a Supreme Court case, while the cases stating the basic rule are lower court cases.

F. Proof at Trial

The landowners relied on, and followed, *Pope & Talbot* in proving their case at trial. The United States made no effort to demonstrate (and could not have successfully demonstrated) that the damages to the remainder arising out of the partial take and the damages to the remainder arising out of the Fitzsimmons and Glass acquisitions were separable. It rather took the position that "by definition" (Brief of the United States, p. 5), there could be no severance damages under *Campbell* because of the acquisition of adjoining parcels. The temptation of public entities to argue that *Campbell* flatly prohibits severance damages in the case of multiple-parcel acquisitions, without mention of severability, and the success they sometimes enjoy in such endeavors, demonstrates the need for reconsideration. So does the Ninth Circuit opinion in this case, with its well-intentioned but conceptually murky and pragmatically unworkable trichotomized indispensability-substantially-inseparability standard. Such need is further apparent from the ongoing tide of criticism of *Campbell* through many decades from the most sophisticated scholars in the field. If not a decent burial, *Campbell* needs

at least a strict limitation to its own extraordinary facts, and the corpus of eminent domain law needs a statement by this Court of the general rule to which *Campbell* is an exception.

G. Campbell Holding Leads to Injustice and Invites Abuse

Impairment of access resulting from the taking of part of a larger parcel of land has historically been compensable by severance damages. *United States v. Grizzard*, 219 U.S. 180 (1911), *United States v. Welch*, 217 U.S. 838 (1910), and *Union Electric Light & Power Co. v. Snyder Estate Co.*, 65 F.2d 297 (8th cir. 1933) are representative of a myriad cases with widely varied fact situations so holding.

Access is one of the protected individual rights in property enjoying constitutional protection under the traditional bundle-of-rights analysis.

These cases are conceptually incongruent with *Campbell* and its progeny. Under their logic, loss of access because the destructive activity is offsite, no compensable right is created.

In the real world, great harm can result to properties adjacent to properties on which a public project is being built or a public use is being undertaken. The result of such project or use inures to the public generally. There appears to be no basis in logic or equity why the concomitant burdens should not be distributed throughout the public.

Further, the rule of *Campbell* invites abuse. For example, if a condemnor foresaw a large loss-of-access severance damage award from the anticipated acquisition of part of Blackacre, served by a single access road, such damage could be eliminated by the expedient of acquiring a 50-foot strip of an adjacent property, cutting off Blackacre's access, in advance of the anticipated acquisition.

The owner of Blackacre would recover no damage at the time of that taking, in spite of the obvious harm to him, because the activity was on adjacent property. Having lost access, he has no compensable right remaining when the acquisition of his property occurs.

This can be avoided if the entire project-related acquisition, whatever the sequence of its chronological parts, is viewed as an integrated unitary event, and each property owner compensated accordingly. In addition to the probable production of substantive justice, in the overwhelming bulk of cases, this transactional analysis theory also has ease of administration to recommend it.

CONCLUSION

For all the reasons stated herein, it is respectfully urged that this petition be granted.

Respectfully submitted,

BURTON J. GOLDSTEIN
RALPH GOLUB
M. REED HUNTER
JOHN J. DACEY
GOLDSTEIN, BARCELOUX & GOLDSTEIN

JESS S. JACKSON, P.C.
Attorneys for Respondents